No. 80-992

Office Supreme
F I L
FEB
EXANDE
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS FITZPATRICK, FRANK McDONNELL, BRUCE FARRELL, THOMAS FARRON, VINCENT DiGIORGIO, ROBERT VERCILE ROSE, RAYMOND E. FRISS, and BRUCE MESERVEY,

Petitioners,

against

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Respondents,

and

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCLESI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for State Respondents
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7400

SHIRLEY ADELSON SIEGEL
Solicitor General

JUDITH A. GORDON
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

PAGE

Statement of Case 2

ARGUMENT—The fairness examination number 36-435 does not warrant plenary consideration by this Court. As applied to the examination, fairness is racially neutral in purpose and effect and consistent with accepted principles requiring employment tests to be demonstrably job-related and guaranteeing all individuals equal access to public employment 5

Conclusion 9

TABLE OF AUTHORITIES

Cases

Albemarle Paper Co. v. *Moody,* 422 U.S. 405 (1975) 3, 5, 6

Fullilove v. *Klutznick,* —— U.S. ——, 100 S.Ct. 2758 (1980) 7, 8, 9

Griggs v. *Duke Power Co.,* 401 U.S. 424 (1971) 5, 6

Minnick v. *California Department of Corrections,* 95 Call. App. 2d 506, 157 Cal. Rptr. 260 (1979), *cert. granted* —— U.S. ——, 65 L.Ed. 2d 1139 (1980) .. 8

United Steelworkers of America v. *Weber,* 433 U.S. 193 (1979) 8

University of California Regents v. *Bakke,* 438 U.S. 265 .....3, 5, 6

State Constitutional Provisions

PAGE

N.Y. Const. Art. V, § 6 2

State Statutes

N.Y. Civil Service Law § 50 2

Federal Regulations

Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 *et seq.*, 43(166) Fed. Reg. 38295 (Aug. 25, 1978)

§ 1607.14B 2

§ 1607.14B(3) 2

§ 1607.14B(5) 2

§ 1607.14B(8) 2, 3, 4, 5, 6

Miscellaneous

43 (166) Fed. Reg. 38294-38295 (Aug. 25, 1978) 3

No. 80-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS FITZPATRICK, FRANK MCDONNELL, BRUCE FARRELL, THOMAS FARRON, VINCENT DIGIORGIO, ROBERT VERCILE ROSE, RAYMOND E. FRISS, and BRUCE MESERVEY,

Petitioners,

against

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Respondents,

and

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSIONER; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCLESI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Statement of the Case

The United States Court of Appeals for the Second Circuit upheld the testing and scoring methods used on examination number 36-435 for promotion to New York State Correction Sergeant because they satisfied technical standards for criterion-related validity, set forth in the Uniform Guidelines on Employee Selection Procedures ("Guidelines"), 29 C.F.R. § 1607.14B, 43 (166) Fed. Reg. 38290, 38300-38302 (§ 14.B) (Aug. 25, 1978), and state law requirements for competitive examinations, N.Y. Const. Art. V, § 6; N.Y. Civil Service Law § 50. Opinion below, App. A-3 to A-13, affirming 428 F. Supp. 1179 (S.D.N.Y. 1980), reproduced at App. B-1 to B-15.* Petitioners now seek plenary consideration of one aspect of the examination's criterion validity study, the addition of 250 points to the composite test scores of minority candidates to make the examination 'fair' under § 1607.14B(8) of the Guidelines (43 [166] Fed. Reg., *supra,* at 38301-38302, § 14.B[8]).**

A fairness inquiry is a technical incident of all criterion validity studies which include populations of sufficient size and range and the related data necessary to make the inquiry feasible. *Ibid.* Compare Petition, pp. 9, 15, describ-

---

* References preceded by "App." are to the appendix to the Petition. Prior decisions and orders in this case are cited to the reports in which they appear and to the appendix when first referenced and thereafter only to the appendix.

** A candidate's composite score on examination number 36-435 is a weighted sum of his raw scores on two test measures, an on-the-job performance rating and a multiple-choice written test. Opinion below, A-4. There was no oral test or interview. Compare Petition, p. 7. It is conceded that the composite test scores so obtained are predictive of, or significantly correlate with, indepently developed criterion measures of important job elements and behaviors. Petition, pp. 9, 10 and Siegal September 26, 1979 affidavit, App. L-3. See Guidelines § 1607.14B(3),(5), 43 (166) Fed. Reg., *supra,* at 38300-38301, § 14B(3),(5).

ing the fairness provisions of the Guidelines as separate from the technical standards for criterion validity. The inquiry assesses the predictive accuracy of the test scores of race and/or sex identified candidate groups through statistical comparisons between those test scores and the scores obtained by groups with the same characteristics on independent criterion measures of job performance. An examination is unfair if "members of one race, sex or ethnic [candidate] group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance," i.e., in the designated criterion measure or measures. Guidelines § 1607.14B(8)(a) (reproduced at App. M-5). An unfair examination cannot be used unless it is made 'fair' by appropriate revisions . . . to assure compatibility between the probability of successful job performance and the probability of being selected." Guidelines § 1607.14B (8)(d) (reproduced at App. M-5 to M-6). See opinion below, A-7. Although a fairness inquiry and the statistical comparisons and revisions it entails reflect the forefront of the state of the art in employment testing, it is the accepted professional and legal standard. See 43 (166) Fed. Reg., *supra,* at 38294-38295 ¶ 7, discussing the Guidelines" fairness requirement (§ 1607.14B [8]) and noting its incorporation in the American Psychological Association Standards for Educational and Psychologicel Tests and its consistency with principles of equal employment opportunity established in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). See also *University of California Regents* v. *Bakke,* 438 U.S. 265, 306 n. 43 (opinion of POWELL, J.) (1978); *Id.* at 364 n. 3 7(opinion of BRENNAN, J.). Compare Petition, pp. 12, 17-20, 22.

The fairness inquiry for examination number 36-435 compared the composite test ("predictor") scores of whites and minorities with the criterion scores of the same race-

identified groups. Siegal affidavit, App. L-4.* The results (displayed at App. L-10) show, *inter alia*, that whites have higher predictor scores than their minority counterparts who will perform the job just as well (as demonstrated by the criterion scores). Siegal affidavit, App. L-5 to L-6. Since predictor scores determine the likelihood of appointment as a Correction Sergeant, the above results permit whites with a particular level of job performance to be selected at a higher rate than minorities with the same measured job performance (*Id.* at App. L-6 to L-7), and the examination is unfair under the Guidelines § 1607.14B (8)(a) (App. M-5). To eliminate this unfairness, the predictor scores of minority candidates were revised by adding 250 points. Siegal affidavit, App. L-7. The 250 points are the empirically observed difference between the substantially equivalent work performances of the white and minority groups and their predictor scores. *Ibid.* See opinion below, App. A-5 to A-6.

The Court of Appeals reviewed the same challenges to the fairness of examination number 36-435 presented in the Petition. The court recognized that the examination's criterion validity and its fairness were components of a single validation strategy (opinion below, App. A-8 to A-9); that the examination could not be accepted as valid without regard to its fairness (*Id.* at App. A-6); and that the 250 point differential was not a quota or 'reverse discrimination' but the means of preventing discrimination (*Id.* at A-6, A-7).

---

* The composite scores were not compared with the on-the-job performance ratings which was one of the test measures. See second footnote p. 2, *ante*. Compare Petition, p. 9.

ARGUMENT

The fairness of examination number 36-435 does not warrant plenary consideration by this Court. As applied to the examination, fairness is racially neutral in purpose and effect and consistent with accepted principles requiring employment tests to be demonstrably job-related and guaranteeing all individuals equal access to public employment.

Petitioners several arguments in favor of plenary consideration misconceive the purpose and effect of the fairness inquiry for examination number 36-435. The inquiry and consequent addition of 250 points to the test scores of minority candidates confirm rather than oppose the principle that employment tests must be demonstrable measures of job performance. Compare Petition, pp. 16-17 citing *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), and *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 436 (1971). They do not read or apply the Guidelines to require "identical rates of success" (Petition, p. 18) or "equality of results" (*id.* at p. 22) across "competing racial groups." *Id.* at p. 18. Nor do they reach the limits of minority preferences previously considered by this Court under either the Equal Protection Clause or Title VII. Compare Petition, pp. 23-26. The fairness revision in the test scores authorized by § 1607.14B(8)(d) (App. M-5 to M-6) of the Guidelines and applied to examination number 36-435 is not a minority preference, quota, hiring goal or affirmative action program. It is the most precise technical means the state of the art permits for achieving equality of employment opportunity and eliminating irrelevant racial bias which would have operated in examination number 36-435, if not corrected, to favor an identifiable group of white candidates over minority candidates with an equal likelihood of job success. See *University of California*

Regents v. *Bakke,* 438 U.S. 265, 306 n. 43 (opinion of POWELL, J.) (1978); *id.* at 364 n. 37 (opinion of BRENNAN, J.); *Albemarle Paper Co.* v. *Moody, supra,* at 417; *Griggs* v. *Duke Power Co., supra,* at 429-30.

The fairness inquiry for examination number 36-435 compared the test "predictor" scores of race-identified candidate subgroups with independent measures of job performance, or criterion scores, for the same subgroups. See discussion pp. 2-3, *ante.* The results of the statistical comparisons disclosed that whites with the same measured job performance (criterion scores) as their minority counterparts received higher predictor scores and thereby, an enhanced likelihood of appointment as Correction Sergeants. See discussion pp. 3-4, *ante.* Had the examination been used without modification, it would have included an inherent and irrelevant racial bias, i.e., whites would be appointed in preference to minorities because of the whites' higher predictor scores when the minorities' criterion scores demonstrated that they could do the job as well as the whites so appointed. *Ibid.*• The 250 point fairness revision eliminates the discrepancy between minority predictor and criterion scores with the purpose and effect of making the test scores of both whites and minorities equally accurate predictors of successful job performance. See Guidelines § 1607.14B(8) (d) (App. M-5 to M-6), opinion below, App. A-6 to A-9, and discussion p. 4 *ante.* The result of a racially neutral selection procedure (opinion below, App. A-6) literally based on demonstrable measures of job performance well within the principles established by *Bakke, Albermarle* and *Griggs.* Indeed, as the opinion below recognizes (App. A-8 to A-9), had the state respondents failed to

---

• Petitioners advocate exactly this biased result in asking the Court to grant plenary consideration in order to preclude further use of the fairness technical standard in criterion validity studies. See Petition, pp. 17-23 and discussion pp. 2-3, *ante.*

make the fairness revision, examination number 36-435 would be invalid. Since criterion validity depends on significant correlations between test and job performance measures, a significant correlation between test score and racial identity once found, must be corrected (or shown to be job-related, a demonstration never made by petitioners), or the test results will be skewed by variables unrelated to successful job performance. *Ibid.*

Examination number 36-435, as revised for fairness, provides equal employment opportunities for whites and minorities with the same measured job performance. See discussion pp. 3-4, 5-6, *ante.* Unlike racial quotas or preferences, minority candidates with revised test scores do not obtain opportunities for appointment in disregard of their own skills or those of white candidates, and they are not guaranteed appointments equal to, or in proportion with, whites. Opinion below, App. 6, A-7. Compare Petition, pp. 18, 22. Both candidate groups earn their positions on the eligible list in the same way, by obtaining examination scores which are the most accurate predictors of job success possible, and no one group, or candidate, "bumps" another. Opinion below, App. A-7 to A-8 and discussion pp. 2-4, 5-6, *ante.* Compare Petition, pp. i (Question Presented), 24, 26. Of perhaps greater significance, the fairness inquiry is not minority oriented, i.e., all race and sex-identified candidate subgroups must be considered, and a 'white' 'male' subgroup is entitled to a revision in scores in the same manner as a 'black' 'female' subgroup upon a technically sufficient showing of a disparity between test and job performance measures. Nor does fairness involve *a priori* judgments about the appropriate racial make-up of an employer's work force. Compare *Fullilove* v. *Klutznick,* —— U.S. ——, 100 S. Ct. 2758 (1980), approving federal requirement that ten percent of federal funds provided for state and local public works be earmarked

for minority owned enterprises; *United Steelworkers of America* v. *Weber,* 433 U.S. 193 (1979), approving private, voluntary affirmative action plan with proportional minority hiring and promotion goals and seniority preferences; *Minnick* v. *California Department of Corrections,* 95 Cal. App. 2d 506, 157 Cal. Rptr. 260 (1979), *cert. granted* —— U.S. ——, 65 L. Ed. 2d 1139 (1980), approving state affirmative action plan with proportional minority hiring and promotion goals and requiring the sex and race of essentially equally qualified candidates to be considered in making discretionary appointments from eligible lists.*

The outstanding orders in this case requiring examination number 36-435 to be criterion valid (and fair) under the Guidelines preclude the *de novo* consideration of the alternative application of equal protection and Title VII standards that petitioners request. Petition, pp. 23-26. See Opinion below, App. A-6 n.2; Brief In Opposition for the Kirkland respondents, pp. 3-4 and discussion p. 8

---

* Even if the fairness revision for examination number 36-435 were considered a minority preference, plenary consideration is foreclosed by the cited cases. First, the development and administration of examination number 36-435 as a criterion valid selection procedure (with the related fairness inquiry, see discussion pp. 2-3, *ante*) complied with prior orders in this case intended to remedy the racial discrimination inherent in the previous permanent selection procedure for Correction Sergeant. See July 31, 1974 district court decree, 8 EPD ¶ 9675 (App. F), *aff'd in part, rev'd in part* 520 F.2d 420 (2d Cir. 1975) (App. H); August 3, 1975 order on remand (App. I) and Brief in Opposition for the Kirkland respondents, pp. 6-9. It is therefore subject to less demanding judicial scrutiny than the voluntary programs approved in *Fullilove* and *Weber.* See e.g., *Weber, supra,* at 211-16 (BLACKMUN, J. concurring). Second, the 'preference' affected by the fairness revision is *de minimis* in comparison to *Fullilove* and *Weber.* The 250 point addition (of a total of 8,830 points available on the examination) is an approximate three percent differential in favor of minority candidates, an increment which the Court of Appeals refused to find "substantial" as a matter of law. Opinion below, App. A-13.

footnote. Moreover, the racial neutrality of the examination, as revised for fairness, necessarily satisfies even the most searching equal protection scrutiny. If viewed as a minority preference, *Fullilove* forecloses further consideration. The Court there found state action in aid of minority preferences far more substantial to be constitutionally permissible.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for State Respondents

SHIRLEY ADELSON SIEGEL
Solicitor General

JUDITH A. GORDON
Assistant Attorney General
of Counsel